

1976 S.C. Op. Atty. Gen. 89 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4272, 1976 WL 22892

Office of the Attorney General

State of South Carolina

Opinion No. 4272

FEBRUARY 26, 1976

\*1 A Municipality may not enact an ordinance prohibiting the sale of beer and wine.

TO: Honorable C. Kenneth Powell  
Commissioner  
South Carolina Alcoholic Beverage Control Commission

QUESTION PRESENTED:

May a Municipality pass an ordinance that would prohibit the sale of beer and wine in the city limits?

STATUTES, CASES, ETC., INVOLVED:

[Lomax v. City of Greenville](#), 225 S.C. 289, 82 S.E.2d 191 (1952).

[Clegg v. City of Spartanburg](#), 132 S.C. 182 128 S.E. 36 (1925).

[Fowler v. City of Anderson](#), 131 S.C. 473 128 S.E. (1925).

[City of Charleston v. Jenkins](#), 243 S.C. 205, 133 S.E.2d 242 (1963).

[Law, et al. v. City of Spartanburg](#), 148 S.C. 229, 146 S.E.12 (1928).

[McAbee v. Southern Railway Co.](#), 166 S.C. 166, 164 S.E. 444 (1931).

[Richards, et al. v. City of Columbia, et al.](#), 227 S.C. 538, 88 S.E.2d 683 (1955).

[State v. Langley](#), 236 S.C. 583, 115 S.E.2d 308 (1960).

[Arnold v. City of Spartanburg](#), 201 S.C. 523, 23 S.E.2d 735 (1943).

Sections 4–201, et seq., Code of Laws of South Carolina, 1962, as amended.

Section 47–61, Code of Laws of South Carolina, 1962, as amended.

McQuillen Municipal Corporation, 3rd ed., Sections 24, et seq.

62 CJS Municipal Corporation.

48 CJS Intoxicating Liquors.

DISCUSSION OF ISSUE:

Municipalities within the State of South Carolina are granted very broad police powers pursuant to Section 47–61, Code of Laws of South Carolina, 1962, as amended.

The City and town councils of the cities and towns of the State shall, in addition to the powers conferred by their respective charters, have power and authority to make, ordain and establish all such rules, bylaws, regulations and ordinances, not inconsistent with the laws of the State, respecting the roads, streets, markets, police, health and order of such cities and towns or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns or for preserving health, peace, order and good government within them. And the city and town councils may fix fines and penalties for the violation thereof, not exceeding one hundred dollars' fine or thirty days' imprisonment.

This power is said to be limited by the proviso that legislation thereunder shall not be inconsistent with the laws of the State. City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963); Lomax v. City of Greenville, 225, S.C. 289, 82 S.E.2d 191 (1954). The powers of municipalities to regulate the sales of beer, wine, and alcoholic beverages have been scrutinized by the Courts of this and other jurisdictions. The Courts have consistently concluded that the regulation of intoxicating beverages is within the police power of a municipality and is justified when shown to be necessary and reasonable. McQuillen Municipal Corporation, Section 24.103. In South Carolina, the Court has had the occasion to rule on the validity of municipal regulations which affect the hours that the sales of beer and wine are permitted. The Court, in City of Charleston v. Jenkins, *supra*, upheld a regulation which restricted the sale of beer and wine in the early morning hours. The Court reasoned that this ordinance was within the police power of the City of Charleston and it was not in conflict with any State law, and therein concluded that the restrictions imposed by the ordinance amounted to additional regulation of beer and wine sales and that accordingly, the regulations were not in conflict with the State law. The Court further noted that:

\*2 Such power to regulate valid business enterprises, including those which have been licensed by the State, has been exercised by municipalities ever since their inception with reference to a variety of legal enterprises of a commercial nature, particularly with reference to business transactions on Sunday.

In Arnold, et al. v. City of Spartanburg, 201, S.C. 490, 23 S.E.2d 735 (1942), the Court upheld a similar ordinance which regulated the selling of beer and wine on Sunday. The Court stated therein that ‘as a general rule, additional regulation to that of the State law does not constitute a conflict therewith.’

In the question presented, however, the municipality is seeking not to regulate the hours at which the sales of beer and wine are permitted, but instead to prohibit altogether the selling of beer and wine within the territorial limits of the municipality. ‘Prohibition’ ordinarily refers to a ‘forbidding’ or ‘preventing’ of an act and thus constitutes a much greater hindrance to a business than that of reasonable regulation. It can readily be ascertained upon an analysis of the statutory law of South Carolina, particularly Section 54–201, *et seq.*, of the Code of Laws of South Carolina, 1962, as amended, that the intended policy of the State relative to beer and wine is that of regulation rather than prohibition. See State v. Langley, 236 S.C. 583, 11 S.E.2d 308 (1960). The State provides for the licensing of beer and wine dealers (Section 4–211); as well as for a determination by the State that the places so licensed are proper locations for the sale of beer and wine (Section 4–212 6). A municipality which prohibits the selling of beer and wine within its boundaries would be frustrating the policy of the State to permit the regulated sales of beer and wine. Ordinances which are in conflict with State policy are not valid. McQuillen, *supra*, Section 24.

It is generally said that an ordinance is in conflict with a State statute when such ordinance either prohibits that which the State permits or authorizes, or authorizes that which the State prohibits. 62 CJS Municipal Corporation, Section 143; 37 Am Jur. Municipal Corporation, Section 143; City of Charleston v. Jenkins, *supra*. It is further noted at 62 CJS Municipal Corporation, Section 143 that a municipality cannot totally prohibit that which a State licenses. The Courts of this State have recognized this specific legal premise and have ruled in accord.

That which the State authorizes, directs, requires, licenses, or expressly permits a municipality is powerless to prohibit. (Emphasis added) Law, et al. v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928)

In the case of [Clegg v. Spartanburg](#), 132 S.C. 182, 128 S.E. 36 (1925), the Court reviewed a municipal ordinance that prohibited pool halls within the municipality. The Court therein noted a well established legal principle.

The soundness of the general principle that what the state has so far recognized as a legitimate business as to license, a municipality cannot prohibit, may be readily conceded. (Emphasis added)

\*3 In the [Clegg](#) case, a statute authorized the licensing of pool halls in unincorporated areas of the State only. Therefore, the Court determined that there was no legislation that authorized the licensing of pool halls within municipalities and, accordingly, the ordinance prohibiting the same was not in conflict with the State statutes. The opinion gave every indication that if the statute provided for the licensing of pool halls within municipalities that no ordinance could prohibit their existence. The Court in [Fowler v. Anderson](#), 131 S.C. 473 (1925), reviewed a similar ordinance prohibiting pool halls within the city of Anderson. In that decision, the Court upheld the municipal ordinance solely on the basis of a proviso at the end of the statute, which stated: Provided that this act shall not authorize nor empower any person, firm or corporation, to operate a billiard room or table in any town or city wherein the operation of such billiard room or table is forbidden by the ordinances of such towns or cities.

The Court in [Fowler](#) clearly indicated that a municipal ordinance which prohibited pool halls in the city of Anderson would not be upheld if the proviso had not specifically created territories exempt from the state licensing statute. Section 4-211, the statute authorizing the licensing of beer and wine sellers, makes no exception for any municipality or for any certain type of beer and wine business; the statute encompasses all beer and wine dealers in the State of South Carolina. Therefore, a municipal ordinance prohibiting the sale of beer and wine would be in conflict with State law authorizing and licensing the selling of beer and wine.

In [Jenkins v. City of Charleston](#), *supra*, the Court in upholding a reasonable regulation distinguished that finding from that of upholding a prohibition.

It must be borne in mind that the ordinance in question does not prohibit the carrying on of a legal business, but is only a regulation . . .

The Court therein further recognized that the State pursuant to Section 4-201, *et seq.*, of the Code had authorized the sale of beer and wine, and that if an ordinance prohibited that which was authorized it could not stand. In [Arnold v. City of Spartanburg](#), *supra*, the same distinction was drawn, and the Court therein indicated that a municipal prohibition would be in conflict with a State licensing provision.

#### CONCLUSION:

The State of South Carolina has expressly authorized the selling of beer and wine in the State of South Carolina and has specifically provided for the licensing of and the regulation of beer and wine dealers. A municipal ordinance that prohibits altogether the sale of beer and wine would in conflict with the State's authorization of the same and would, therefore, invalid.

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